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No. 361

In the Supreme Court of the United States

OCTOBER TERM, 1951

ARMAND EDWARD BLACKMAR, PETITIONER

v.

L. F. GUESSER, MANAGER, VETERANS' ADMINISTRATION REGIONAL OFFICE NO. 3021, NEW ORLEANS, LOUISIANA, AND UNITED STATES CIVIL SERVICE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

This memorandum is submitted in response to the request of Mr. Justice Frankfurter at the close of oral argument for further discussion of the effect upon the suability of the United States Civil Service Commission of Section 12 (c) of the Hatch (Political Activities) Act of 1939, as added by the Act of July 19, 1940, 54 Stat. 767, 5 U. S. C. (Supp. IV) 118k (c).

It is the position of the respondents that Section 12 (c) of that Act makes the Civil Service Commission a suable entity solely for the pur-

poses of judicial review of determinations made by the Commission under Section 12 (b) of that Act, and that the Commission is not otherwise suable as an entity. That the scope of Section 12 (c) is thus limited is apparent both from the internal structure of the Act as a whole and from the legislative history of Section 12 (c).

In its original form, the Hatch Act provided in Section 9 (a) that "It shall be unlawful for any person employed in the executive branch of the Federal Government * * *, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. * * * [and to] take any active part in political management or in political campaigns" (53 Stat. 1148 (5 U. S. C. Supp. IV) 118i (a)). And Section 9 (b) declared that "Any person violating the provisions of this section shall be removed immediately from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person" (53 Stat. 1148, 5 U. S. C. (Supp. IV) 118i (b)). By the Act of July 19, 1940, 54 Stat. 767, Congress added Section 15 to the Hatch Act, which expanded the prohibitions on political activities of federal employees (5 U. S. C. (Supp. IV) 118*l*):

> The provisions of this act which prohibit persons to whom such provisions apply from taking any active part in political

> management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns.

See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 78–79.

As thus enacted, there was no specific designation of a single government agency for the enforcement of Section 9. However, as this Court noted in *United Public Workers* v. *Mitchell*, *supra*, at 79–80:

> For many years before the Hatch Act the Congress had authorized the exclusion of federal employees in competitive classified service from active participation in political management and political campaigns. In June 1938, the congressional authorization for exclusion had been made more effective by a Civil Service Commission disciplinary rule. *That power to discipline members of the competitive classified civil service continues in the Commission under the Hatch Act by virtue of the present applicability of the Executive Order No. 8705, March 5, 1941.* [Emphasis supplied.]

Of importance here is the fact that Congress made no provision for judicial review of orders of the Commission enforcing the provisions of Section 9. See *United Public Workers* v. *Mitchell*, *supra*, at 93.

In contrast to the absence of any provision for judicial review of discharges of Federal employees under Section 9, Congress did provide for review of disciplinary action taken under Section 12, which was also added to the Hatch Act by the Act of July 19, 1940, *supra*, 5 U. S. C. (Supp. IV) 118k. Section 12 (a) extended the prohibitions of Section 9 to the officers or employees "of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency" (5 U. S. C. (Supp. IV) 118k (a)). Section 12 (b) requires the Civil Service Commission, upon receipt of information which warrants an investigation, to determine at a hearing whether a violation of Section 12 (a) has taken place and, if so, whether the violation warrants the removal from office of the person by whom it was committed. If the Commission determines, after the hearing, that a violation of Section 12 (a) has occurred which warrants removal from office, notice of its determination is given to the employee and the appropriate State or local agency. If the employee is not removed within thirty days after notice of the Commission's determination, the

Commission is required to issue to the appropriate Federal agency an order requiring that agency to withhold from its grants to the State double the amount of the annual compensation of the offending officer or employee (5 U. S. C. (Supp. IV) 118k (b)). Section 12 (c) permits "Any party aggrieved by any determination or order of the Commission" to institute review proceedings, within thirty days after the mailing of the Commission's notice, in the Federal district court for the district in which the offending officer or employee resides. "A copy of such petition shall forthwith be served upon the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the determination or the order complained of was made" (5 U. S. C. (Supp. IV) 118k (c)).

In short, Congress drew an express distinction between the rights of Federal employees and State employees with respect to judicial review. Specific provision was made for suits against the Commission in cases of alleged violations of Section 12 by State employees; no provision was made for review in cases of alleged violation of Section 9 by Federal employees. We think it not without significance, in this connection, that the actions which have heretofore been brought to test the constitutionality of Sections 9 and 12 of the Hatch Act have conformed to this distinction in their designations

of parties defendant. Thus, the validity of Section 9 was attacked in a suit against the Commissioners themselves (*United Public Workers* v. *Mitchell, supra*), whereas the validity of Section 12 was challenged in a suit against the Commission (*Oklahoma* v. *Civil Service Commission*, 330 U. S. 127).[1] In view of this dichotomy within the Hatch Act itself with respect to the suability of the Civil Service Commission, that Act certainly provides no support for the suggestion that Congress thereby made the Commission a suable entity for all purposes.

That Congress did not intend to make the Commission generally suable is also demonstrated conclusively by the legislative history of Section 12. As previously noted, Section 12 was added by the Act of July 19, 1940, *supra*. The bill contained no provision for judicial review when introduced, although it did include a provision permitting a State to participate in the administrative proceeding. 86 Cong. Rec. 2344.[2] An amendment was offered by Senator Danaher permitting an "appeal" to a federal district court by a State "officer or employee, or the appropriate State or local agency, or both * * *," in accordance with the procedure established by the Chandler

[1] The *Mitchell* suit was instituted in the District Court for the District of Columbia, the Oklahoma suit in the District Court for the Northern District of Oklahoma.

[2] S. 3046, 76th Cong., 3d sess., reported to the Senate by the Committee on Privileges and Elections on February 26, 1940, 86 Cong. Rec. 1944.

Act (11 U. S. C. 67 (c)), 86 Cong. Rec. 2429. This amendment, which eventually became Section 12 (c) of the Act, was vigorously opposed on the ground that it would be inequitable to afford a right of judicial review to a State or local employee when no such right was available under existing law to federal employees who are discharged for cause. 86 Cong. Rec. 2429–2430, 2648–2472; see also 86 Cong. Rec. 9448.

The following colloquy between Senators Norris and Danaher is particularly revealing on this score (86 Cong. Rec. 2429–2430):

> Mr. NORRIS. * * * Does not the Senator see that such employees are akin to the employees in any of the Federal departments? Suppose some one in the War Department should violate a rule, or for any other reason should be discharged by his superior officer; should we not give to him the blessed right of appeal and let him go to the Supreme Court, and provide that in the meantime the War Department must permit him to continue to draw his salary? It seems to me that if we should apply the same theory to everything that is akin to this situation we should have more cases in the Supreme Court than a dozen Supreme Courts could take care of.
>
> Mr. DANAHER. Has the Senator concluded?
>
> Mr. NORRIS. Yes.
>
> Mr. DANAHER. Let me answer the Senator in this way: It seems to me that the

fact that at present there is no machinery for appeal under the civil service is a very serious defect, and those of us who are interested in civil service have long regretted it. Under Federal law there is no right of appeal today for a civil servant who is wrongfully dismissed. I am perfectly willing that such employees be given the machinery within the civil-service structure to take appeals. I am perfectly willing that amendatory legislation to that effect be achieved. However, I have not undertaken to make my amendment applicable to all civil-service legislation.

Mr. NORRIS. Why not?

Mr. DANAHER. We are working on a particular bill.

Mr. NORRIS. Why not make the amendment applicable to all civil-service legislation?

Mr. DANAHER. I am willing that that be done.

Mr. NORRIS. Let us do that, and kill the bill.

Mr. DANAHER. We are working on a particular bill. We are not working on the Civil Service Act of 1882. Consequently, when we take this step, if it be a good precedent, if it affords a sound basis for appeal, and if it looks to the protection of the injured employee or officer who is removed from the rolls, it will do exactly what some of us, I am sure, want to see done in the interest of justice to the accused. * * *

In the light of this legislative history, there can be no doubt that the Hatch Act did not purport to make the Civil Service Commission suable as a juridical entity in cases such as the one at bar.

In authorizing the Commission to be sued as a juridical entity in certain Hatch Act cases, Congress did no more than to designate the Commission as a statutory defendant to stand in judgment on behalf of the United States so that a decree against it would bind the Government for the limited purposes of review of action taken under Section 12 of the Hatch Act. Cf. *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 27. Congress has similarly provided, in other special cases, for consented suits against the United States to be brought against other agencies of the United States as nominal defendants. *E. g.*, Section 204 of the Packers and Stockyards Act, 7 U. S. C. 194 (Sec'y of Agriculture); Section 6 (a) of the Commodity Exchange Act, 7 U. S. C. 8 (Sec'y of Agriculture, Sec'y of Commerce, and Atty. General); Section 9 (a) of the Trading With the Enemy Act, 50 U. S. C. App. 9 (a) (Atty. General, as successor to Alien Property Custodian); Section 503 of the Nationality Act of 1940, 8 U. S. C. 903 (Sec'y of State, and others); Section 3 of the Bridge Act of 1935, 33 U. S. C. 505 (Sec'y of War). Yet, it has never been supposed that such limited waivers of sovereign immunity for particular purposes were

general waivers for all purposes. Thus, although the Department of Agriculture is suable in the name of the Secretary of Agriculture under the Packers and Stockyards Act, it is well-settled that the Department of Agriculture is not otherwise a juridical entity which may be sued generally. *United States* v. *Remund*, 330 U. S. 539; *United States Department of Agriculture* v. *Hunter*, 171 F. 2d 793, 795 (C. A. 5); *Herren* v. *Farm Security Administration*, 153 F. 2d 76 (C. A. 8). To the same effect, see also, *e. g.*, *Love* v. *Royall*, 179 F. 2d 5, 7 (C. A. 8) (suit against Secretary of War and War Department); *Fay* v. *Miller*, 183 F 2d 986 (C. A. D. C.) (suit against United States Attorney); *Ann Arbor Township* v. *United States*, 93 F. Supp. 341, 343 (E. D. Mich.) (suit against Veterans' Administrator and Veterans' Administration)?

Because Congress has thus limited the instances in which the Civil Service Commission and other normally nonsuable agencies of the United States, such as the heads of the cabinet departments, may be sued, their amenability to suit depends upon an express statute and is quite different from that of the Government's corporate agencies. Unlike a corporate agency such as the Reconstruction Finance Corporation, the Civil Service Commission is not engaged in commercial activity, and the Act which created the Commission did not include a "sue-and-be-sued" clause (Act of January 16, 1883, 22 Stat. 403, 5 U. S. C. 632). Nor

did the Hatch Act, the Lloyd-LaFollette Act, or the Veterans' Preference Act include such a general clause.

The views as to amenability to suit expressed by this Court in *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, are applicable to corporate agencies of the Government and are inapposite where noncorporate agencies are concerned. The question there was whether a regional agricultural credit corporation chartered by the R. F. C. pursuant to Congressional authorization was immune from suit in the absence of an express waiver of immunity. In resolving that question, the Court approached the problem by pointing out that (*id.* at 389):

> * * * It is not a textual problem; for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes utilizing *corporations* for governmental purposes and drawing significance from dominant contemporaneous opinion regarding the immunity of governmental agencies from suit. [Emphasis supplied.]

The Court then observed that "In spawning these *corporations* during the past two decades, Con-

gress has uniformly included amenability to law. Congress has provided for not less than forty of such *corporations* discharging governmental functions, and without exception the authority to-sue-and-be-sued was included" (*id.* at 390). "Such a firm practice," the Court stated "reveals a definite attitude on the part of Congress which should be given hospitable scope" (*id.* at 390–391). Continuing, the Court pointed out that the parent corporation, the R. F. C., was authorized to "sue and be sued" and that "Congress naturally assured that the general *corporate* powers to which it had given particularity in the original statute establishing Reconstruction would flow automatically to the Regionals from the source of their being." "Congress had a right to assume that the characteristic energies for *corporate* enterprise with which a few months previously it had endowed Reconstruction would now radiate through Reconstruction to Regional." *Id.* at 393–394. The Court, therefore, concluded that (*id.* at 394):

> To give Regional an immunity denied to more than two score *corporations*, each designed for a purpose of government not relevantly different from that which occasioned the creation of Regional, is to impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none. A fair judgment of the statute in its entire setting relieves us from

making such an imputation of caprice. [Emphasis supplied throughout.]

These considerations, we submit, have no application to the present case. As noted above, the Civil Service Commission is not a corporate agency of the United States, is not engaged in commercial activity, and has not been endowed by Congress with the power to sue and be sued. There is no indication here of a Congressional climate of opinion that the Civil Service Commission should be generally amenable to suit. On the contrary, as shown above, the legislative history of Section 12 (c) of the Hatch Act demonstrates that Congress did not even intend to subject the Civil Service Commission to suit at the behest of Federal employees aggrieved by the Commission's action under that particular statute.

Respectfully submitted.

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FEBRUARY 1952.

U. S. GOVERNMENT PRINTING OFFICE: 1952